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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, et al.,

and

STATE OF TEXAS
Appellants,

vs.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPELLEES' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Section 21.031 of the Texas Education Code denies local school districts State funds for the education of undocumented alien children. It further permits those districts to exclude such children or to admit them upon payment of tuition. All other children residing within a district must be provided tuition-free education for which the district receives State reimbursement. The questions presented are:

1. Whether Section 21.031, by effectively causing the exclusion of undocumented school children, denies them Equal Protection as mandated by the Fourteenth Amendment.

2. Whether Section 21.031 frustrates the objectives of Federal Education Legislation and thus is preempted.

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1965 U.S. Code, Cong. And Admn. News, 1450 ..... 47, 51

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APPELLEES' BRIEF ON THE MERITS

CONSTITUTIONAL AND STATUTORY PROVISIONS

I The Fourteenth Amendment, United States Constitution.

II Article VI, Clause 2, United States Constitution.

III Texas Education Code ANN. tit. 2, § 21.031 (a), (b), (c) (Vernon, 1980)*

STATEMENT OF THE CASE

In May, 1975 the Texas Legislature amended Section 21.031 of the Education Code to provide that School Districts could only apply for State reimbursement for citizens or legally admitted aliens. The Legislation further specified that only those two categories of students were entitled to free public elementary and secondary education. This action followed by one month an opinion by the Attorney General of Texas that the denial of schooling to undocumented children would deny them their right to equal protection of the laws.[1]

The Tyler School District, recognizing that a tuition charge would be tantamount to exclusion, absorbed the total cost of educating children until the 1977-78 school year. Trapped between its belief that exclusion would "penalize (the children) for something their parents had done"[2] and the fact that families seemed to be moving to Tyler to escape the implementation of Section 21.031 in other districts, the TISD Board adopted a policy requiring tuition in the sum of $1,000 per annum.[3]

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*The full text of the relevant parts of these provisions are set forth in Appendix "A" to this brief.

[1]CT Ex. 1, Dec. T. 265. References in this brief will be as follows: JA (Joint Appendix); Sept. T. (September Transcript), Dec. T. (December Transcript); Exhibits will indicate the parties introducing same as follows: P. (Plaintiffs); Tex. (Texas); CT (Court).

[2]JA A-52.

[3]*Id.*

As the TISD projected, few if any parents could pay tuition.[4] Because of the cost of alternatives to public education and the limited availability of such alternatives in any case, these children were effectively denied access to any formal schooling by operation of Section 21.031.[5]

Each of the Plaintiffs was 13 years old or less and had previously been enrolled in the Tyler Schools.[6] All the parents of the children had resided in Tyler for a number of years. One single parent had resided there since 1964 and the three married couples had lived in Tyler for three (3), nine (9) and ten (10) years, respectively.[7]

Whatever the veracity of the common perception that there has been a significant upsurge of illegal immigration from Mexico, the evidence clearly reflects that undocumented aliens rarely bring their children with them.[8] The co-author of the major study on illegal immigration reported that 2.7% of their sample of illegal immigrants had children in the schools (JA B-23). That 2.7% included both documented and undocumented children (JA

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[4]JA A-53, The evidence further reflected that none of the named Plaintiffs was able to afford the tuition and thus each had been effectively excluded from the TISD (JA A-9-11, A-24, A-31); John Eaton, Deputy Superintendent of the Houston ISD testified that *no* children had tendered tuition to that district (JA B-78), the economic plight of most undocumented aliens was recognized by all witnesses (JA A-53, Supt. Plyler; JA B-8, B-10, Prof. Gilbert Cardenas; JA B-16, Marion Houstoun; JA B-66, Shane Davies).

[5]JA A-59, A-62 (Father Milam Joseph).

[6]JA A-5, A-14-15, A-23-24, A-26.

[7]JA A-7, A-16, A-23, A-28.

[8]Witnesses seemed to agree with Marion Houstoun, an expert for the Plaintiffs, that "Data on characteristics of illegal aliens are much more reliable . . . than any kind of data . . . [concerning] numbers" (JA B-14).

B-25).[9] Undocumented aliens, all conceded, tend to be young single males in search of employment.[10] The Court in *In Re Alien Children*, after hearing substantial testimony concerning this issue concluded that the most reasonable figure reflecting the number of undocumented school age children in the State was approximately 20,000. 501 F. Supp. at 577. The total school population of Texas is 2,239,000 (JA B-48). Less than one percent of this total are undocumented children.

The evidence further reflected that the Plaintiffs in particular and undocumented aliens in general contribute to the tax base of the schools in the same manner as other parents. It was uncontested that local funds for schools in Texas are primarily derived from property taxes which are paid by undocumented persons either directly or as part of a rental payment. Thus, like all other persons in a community, these parents contribute to the local tax base. State contributions to schools come directly and indirectly from consumer taxes (P. Ex. 6, Dec. T. 127, JA B-90). Undocumented alien parents pay these taxes just as do all others.

Witnesses for both the Plaintiffs and the State testified that undocumented children are educationally similarly situated to their citizen and permanent resident classmates.[11] Like all children some are smart, some less so;

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[9]Children born of undocumented immigrants in the United States are United States citizens. One of the many perversities of this Legislation is that eligibility for schooling frequently will be different for different members of the same family; in fact, each of the named Plaintiffs has a brother or sister who is, or will be (when of age), eligible to attend school tuition-free (JA A-4, A-12, A-23, A-26).

[10]See e.g. JA B-6, B-15, B-56.

[11]JA B-38, B-76-77, B-89.

some may be exclusively Spanish speaking while others may, as a result of a lifetime in the United States, be monolingual English speaking. In sum these children are as heterogenous in their needs and abilities as any other group of children.[12]

The uncontradicted testimony reflected that these children are likely to remain in the United States whether or not they are educated by the State of Texas.[13] This is likely given the limitations of the Immigration and Naturalization Service (INS), the necessity that the parents remain due to their desperate economic condition, and the ultimate likelihood that the children will be able to adjust their status through one procedure or another.[14] Thus, most of these children, who have no control over their place of residence, are likely to remain in the United States unassimilated and illiterate should Section 21.031 be upheld. As witnesses for both the State and the Plaintiffs observed, the denial of schooling to these children virtually eliminates any chance these children have to lead meaningful productive lives.[15]

In her opening statement, the Attorney General set forth her understanding of the rationale for the Legislation. She stated, "We will attempt to show that there is a detrimental impact on other students due to cost factors. There are cost factors in terms of lost textbooks, removed textbooks, problems you would not have with the average student".[16]

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[12]*Id.* The State asserts in their brief that undocumented persons generally have no formal education and are of "lower educational capabilities". This testimony concerned *adults* from Mexico and, at least as respects "capability" was vigorously contested. See e.g. JA B-17, B-65. Testimony referred to as showing "overageness" was shown on cross-examination to refer to legal migrant children (JA B-76-77).

[13]JA B-6, B-42, B-57, B-60-62.

[14]See e.g. JA B-6, B-11, B-65. See also JA B-56-57.

[15]JA B-41-42, B-68-69.

[16]JA B-47-48.

Two witnesses were presented by the State to buttress their contention that the inclusion of undocumented children would have a detrimental impact on the educational system. Mr. John Eaton, Deputy Superintendent of the Houston Independent School District (HISD), gave his opinion that the addition of large numbers of students to a school system could result in a reduction of services to other students. Specifically he hypothesized that the addition of these students could result in increased class sizes.[17] On cross-examination Mr. Eaton agreed that pursuant to the State funding formula a district receives funds for an additional teacher for approximately each additional twenty (20) students (JA B-75). He also hypothesized that some of these students would need bilingual assistance[18] and that undocumented students frequently were entitled to supplemental programs which added costs to their education.[19] He agreed that most of these costs are borne by the Federal Government.[20] He also conceded that his projections of educational need were based upon his experiences with migrant children who might or might not have been undocumented.[21]

The second witness presented by the State to show detrimental impact was Jim Bob Hensley. Dr. Hensley, an employee of a State funded regional service center, presented a study which showed that school districts at the border tend to be overcrowded and that the border districts do not have bilingual programs at upper grade levels to meet the linguistic needs of older immigrant students.[22]

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[17]JA B-71-72.
[18]JA B-71-73.
[19]JA B-70.
[20]Dec. T. 275.
[21]JA B-77.
[22]JA B-98-107.

On cross-examination Dr. Hensley agreed that the study dealt with the effects in districts of the presence of legally admitted aliens and did not discuss any particular problem caused by undocumented children.[23]

Tyler officials testified that as a result of the preliminary injunction and the consequent return of Plaintiffs to their schools the number of students needing bilingual assistance totaled over twenty in two grades, triggering the State requirement that certified bilingual teachers be employed in the district's existing bilingual program.[24] This was the only evidence of impact upon the Tyler schools and the Tyler Superintendent agreed it was "desirable" (JA B-45).

Finally, there was uncontradicted testimony that the effect of Section 21.031 was to *reduce* resources to districts with undocumented children rather than expand them, thus undermining a primary justification presently advanced for this Legislation. This occurs because the primary trigger of State funding is an individual student count.[25] Simply, districts forced to deny an education to undocumented children lose State funding for those children while being unable to reduce costs proportionately.[26] This phenomenon was affirmed by both the Tyler Superintendent and Business Manager.[27]

The facts, in sum, present a one-sided picture. Innocent children are being reluctantly denied an education by local school districts because the State has closed the doors of the State Treasury. No benefit was shown or could be shown to accrue to those children remaining. An obvious and irreparable harm is being visited upon those children

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[23]JA B-87.

[24]JA B-45.

[25]JA B-27-34, B-73-75.

[26]JA B-31, B-33-34.

[27]JA A-51, B-43-44.

who comprise the Plaintiff class; ultimately, this harm will fall upon the State and the Nation. The evidence reflects that this legislation is irrational. Each of the lower courts has so found and thus all children are presently attending school.

SUMMARY OF THE ARGUMENT

I. Although this Court has never had the opportunity to directly rule on the issue, the plain meaning of the Equal Protection Clause, its legislative history, this Court's interpretation of its companion, the Due Process Clause, and logic compel recognition that undocumented children are covered by its protections.

The Equal Protection Clause prohibits a State from denying equal protection to "Any person within its jurisdiction". This command contrasts starkly with the Privileges and Immunities Clause which immediately preceeds it and which provides protection for "Citizens of the United States". The Due Process Clause which also protects "persons" has repeatedly been interpreted by this Court as providing protection for undocumented aliens. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Both legislative history and logic support a ruling that a "person" protected by the Due Process Clause is also a "person" for equal protection purposes. Clearly a government that operates on a rule of law cannot tolerate the irrational and arbitrary treatment of persons within its border. Such would be the consequence of the denial of coverage under the Equal Protection Clause.

II. The outcome of this case does not depend upon the standard of equal protection review. The only standard by which this Legislation could be upheld would be one of passive acceptance. By excluding undocumented children to achieve speculative benefits for others, the State is merely making a decision based upon its notion of who is

"deserving" rather than upon any objective factors distinguishing these children and those it permits to receive an education. As the Court below observed, "In light of the application of the Equal Protection Clause, however, Texas may not justify its discrimination by a mere desire to discriminate." *Doe v. Plyler*, 628 F.2d 448, 460 (1980); see also *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

Properly viewed, however, the denial of education to these innocent children must be measured against a heightened standard of review. First, the *absolute denial* of schooling to these children denies them a fundamental right. This case is thus distinguishable from *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), in which a *relative*, speculative deprivation was held not to justify heightened scrutiny. Education, like freedom of speech and equality of access to the ballot is preservative of the rights and liberties which serve as the bedrock of this Nation. The Founders of the Nation recognized that unless the populace had some quantum of education the Nation could not long survive. What was true in the Eighteenth Century is even more so in today's world, and is no less true when the deprivation is suffered by undocumented children.

Secondly, heightened scrutiny is appropriate whenever a State chooses to punish individuals for wrongs committed by others. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). If a wrong has been committed here it is the wrong of a financially desperate parent seeking to make a living and to preserve his family's unity. If this be wrong, surely the child who has no say nor control over his residence should not be the recipient of so unfair and drastic a punishment.

Finally, heightened scrutiny is appropriate for this harm is being visited upon children whose parents are unable to protect their interests through the political process. *Graham v. Richardson*, 403 U.S. 365 (1971).

III. Section 21.031 further conflicts with and frustrates the purposes of Federal Education policy. That policy is to assist those students who are most in need, recognizing that low academic achievement is often related to poverty. That policy, primarily articulated in the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 2701 *et seq.* has been reenacted in approximate four (4) year cycles since 1965, frequently at times when immigration policies were being roundly debated in Congress. Undocumented children, many of whom are known to be poor and to be in need of the programs provided by the ESEA, have never been denied those benefits.

ARGUMENT

I

UNDOCUMENTED CHILDREN ARE PROTECTED BY THE EQUAL PROTECTION CLAUSE

Section One of the Fourteenth Amendment states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

By its express terms the Equal Protection Clause protects "persons". There are no modifiers of the word "person" which would exclude undocumented aliens. Conversely the Privileges and Immunities Clause, found also in Section One of the Fourteenth Amendment, expressly limits its protection to "citizens".

The Congressional debate surrounding the adoption of the Fourteenth Amendment establishes conclusively that this distinction was not accidental. It further suggests that the framers of Section One viewed the majestic promises of the Due Process and Equal Protection Clauses

as basic and interrelated and protective of whomever should step upon our soil. Finally, the debate suggests that the protective umbrella of the Due Process and Equal Protection Clauses was fashioned to cover an identical class of persons.

The Fourteenth Amendment evolved from a joint House-Senate Committee known as the Joint Committee of Fifteen on Reconstruction. While that Committee considered various versions of what would come to be known as the 14th Amendment, "Two classes of persons were recognized in all the resolutions."[28] To "citizens" were accorded Privileges and Immunities; "To the other class designated as 'persons' was to be secured equal protection in the right of life, liberty and property."[29]

Representative John Bingham of Ohio, a member of the Committee, is generally considered the author of Section One. During the floor debate in the House just prior to passage Rep. Bingham construed Section One as being designed "to protect by national law the Privileges and Immunities of the citizens of the Republic and the *inborn rights of every person within its jurisdiction* whenever the same shall be abridged or denied by the unconstitutional acts of any State."[30] Later in the debate Rep. Bingham observed "That great want of the *citizen and stranger*, protection by national law from unconstitutional State enactments is supplied by the first section of this amendment."[31]

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[28]H. Flack, "The Adoption of the Fourteenth Amendment" (1908) at 63-64.

[29]*Id.*

[30]39 Congressional Globe, 1st Section 2542 (May 10, 1866) (Emphasis added).

[31]*Id.* at 2543 (Emphasis added). The reference to the "stranger" obviously referred to the sentences containing the Due Process and Equal Protection clauses as the Privileges and Immunities Clause was applicable only to "citizens".

Senator Jacob Howard was the floor manager of the Amendment in the Senate as well as a member of the Committee of Fifteen. During the Senate floor debate preceding passage Senator Howard presented the "views", "motives" and "aims" of the Committee in approving the amendments.[32] Senator Howard described the construction that the Committee put upon the Equal Protection and Due Process Clause as follows:

> The last two clauses of the First Section of the Amendment disable a State from depriving not merely a citizen of the United States, but *any person, Whoever he may be* of life, liberty or property without process of law *or* from denying to him the equal protection of the laws . . . It will, if adopted by the States forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction.*[33]

No member of the Committee challenged Senator Howard's construction of its intent and the amendment was approved immediately thereafter.

These statements of the original meaning of the Amendment by its author and floor managers provide assurance that even "the stranger" was deemed protected by the Equal Protection Clause.[34] They also reflect that the Due

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[32]39 Congressional Globe, 1st Section 2765 (May 23, 1866).

[33]39 Congressional Globe, 1st Section 2766 (May 23, 1866) (Emphasis added).

[34]"There was, of course, no such thing as an "undocumented alien" at the time of the consideration of Section One. However, both the expressions of the fundamentality of the Equal Protection and Due Process clauses and the desire to provide those basic protections to even the "stranger" or one "who may happen to be within the jurisdiction" compel a conclusion that its sweep is territorial and not predicated upon status.

Process and Equal Protection Clauses were considered one basic fundamental package that protected an identical group of "persons." Due Process is not discussed separately from equal protection. Indeed they are seen as advancing jointly "inborn and fundamental rights."[55]

This Court has repeatedly ruled that the Due Process Clause protects undocumented persons who are within the territory of the United States. *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1902); *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Neither the language of the Equal Protection Clause nor its history permits of a different construction of that clause.

While this Court has never ruled expressly on this matter, it has acknowledged the commonality of coverage between the Due Process and Equal Protection clauses. Notably it chose to do so in the seminal case establishing coverage of undocumented aliens by the Due Process Clause. As this Court observed in *Wong Wing v. United States*, 163 U.S. 228 (1896):

> . . . [I]n the case of *Yick Wo v. Hopkins*, 118 U.S. 369, it was said:
>
> "The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'. *These provisions are universal in their application to all persons within the territorial* jurisdiction, without regard to any difference of race, of color or

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[55] *Supra*, n. 44 & 47. There is *no* historical basis for the suggestion that the Due Process Clause is somehow more basic than the Equal Protection Clause; any such distinction would have to be woven of whole cloth. This notion was expressly rejected by the Court below. *Doe, supra*, 628 F.2d 448, 456 n.18.

> nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

163 U.S. at 238 [Emphasis added].

More explicitly, Justice Field in his concurring opinion observed:

> . . . [T]he term "person" used in the Fifth Amendment, is broad enough to include *any and every human being within the jurisdiction of the republic.* A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.

163 U.S. at 242.

In an earlier ruling, this Court recognized that even those who are transitorily within the country are bound by its basic laws and in turn are protected by them. In *Carlisle v. United States*, 16 Wall. 147, 154 (1872) this Court noted:

> "The rights of sovereignty", says Wildman, in his Institute on International Law, p.40, "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. *All strangers are under the protection of the sovereign while they are within his territories*, and owe a temporary allegiance in return for that protection." [Emphasis added].

See also *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).[38]

While lower Courts have had few occasions to rule on this matter, those that have agree that undocumented persons are persons within the meaning of the Equal Protection Clause. *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2nd Cir. 1975), *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D. V.I. 1971).

Clearly the protections provided by the Equal Protection Clause are as basic and fundamental as those of the Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Congress that enacted the clauses saw them as one basic promise of freedom from arbitrary treatment. Subsequent history does not diminish the fundamental role of the Equal Protection Clause in assuring such treatment.

Further a ruling that undocumented persons were not persons within the meaning of the Equal Protection Clause would lead to results at odds with the most fundamental principles of this Nation. It would permit States to treat undocumented persons within its jurisdiction arbitrarily and irrationally, free from any need to justify such treatment. Quite apart from its international implications, a ruling which places an imprimatur of acceptability on State action which is arbitrary and irrational does the most serious violence to the rule of law which must serve as the bedrock of any legitimate Constitutional system.

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[38]The State and several Amici note that Justice Jackson in *Johnson* spoke of an "ascending scale of rights" available to persons of different status. 339 U.S. at 770. Should such a scale exist, it does not answer the question posed here, specifically, are undocumented residents of the United States provided coverage under the Equal Protection Clause? It is also misplaced to argue that the determination of this issue in the affirmative will compel the allocation of every benefit imaginable to undocumented persons. Mere coverage under the Equal Protection Clause is just the beginning of the inquiry, not its end. Cf. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

In sum, the wording of the Fourteenth Amendment, its legislative history, the case law and common sense support a holding that undocumented aliens are protected by the Equal Protection Clause.

II

A STATE STATUTE WHICH DENIES EDUCATION TO UNDOCUMENTED CHILDREN MUST BE STRICTLY SCRUTINIZED

Statutes which impinge upon a fundamental interest or which disadvantage a suspect class must be strictly scrutinized. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

> [A]s previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification", that the State must demonstrate that its educational system has been structured with "precision", and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives . . .

411 U.S. at 16-17 (footnotes omitted).

While the denial of schooling to undocumented children fails to meet even the most relaxed standard of review, strict scrutiny is compelled by the facts of this case. First, the absolute denial of any schooling denies these children a fundamental interest. Secondly, the imposition of one of the harshest punishments imaginable upon innocent children for the acts of their parents is violative of fundamental precepts enbodied in the Constitution. Finally, the use of an alienage classification compels use of heightened scrutiny. While rote adherence to this Court's alienage decisions is not suggested, the principles underlying those decisions compel a scrutiny greater than is invoked in reviewing non-suspect classifications.

A. The Absolute Exclusion From Public Schools Denies Children Access To A Fundamental Right

In *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), this Court ruled that the relative inequalities occasioned by the Texas school financing scheme were not to be given strict scrutiny. In rejecting the request that this Court consider any disparate treatment in the provision of educational programs to be subject to such scrutiny the Court observed,

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and whereas is true in the present case no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

411 U.S. 36-37.

This case presents the question that was left open in *Rodriguez*. Alone among all the States, Texas has chosen to exclude a class of children from its public schools because of their status. The harm to society as well as the harm to these children of absolute exclusion demands that the State's justification meet the standards of strict scrutiny.[37]

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[37]It is suggested by the State that no exclusion exists because the children could return to school in Mexico. This ignores the fact that these children do not control their own place of residence and that their parents, faced with harsh economic choices, will in many instances remain in this Country notwithstanding the impact on their children. (JA A-33-34). Further, many of these children have been in the United States for a number of years and know of Mexico only as the children of other immigrant groups-through

It is not necessary, as this Court observed in *Rodriguez*, that a right be explicitly mentioned in the Constitution to be considered fundamental. "Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.* at 34-35. Nor is it necessary to ascribe the right to a particular constitutional provision. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), this Court ruled equal access to the franchise to be fundamental "because preservative of all rights." Likewise, First Amendment rights are deemed fundamental because "so important to the preservation of the freedom treasured in a democratic society." *Cox v. Louisiana*, 379 U.S. 559, 574 (1964) and because "[T]herein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Although not expressly mentioned in the Constitution it is clear that the Nation's Founders similarly perceived some minimal quantum of education to be preservative of all rights, and necessary for the preservation of the security of the Nation. This Court noted in *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972):

> as Thomas Jefferson pointed out early in our history, some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.

Benjamin Franklin observed that "the good education of youth has been esteemed by wise men in all ages, as the surest foundation of the happiness both of private families and commonwealth."[38]

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legends. Finally, if this notion were accepted, it would provide the perfect response to any State denial of equal protection, "Go to a State where no such denial exists."

[38]B. Franklin, "Proposals Relating to the Education of Youth in Pennsylvania" (1749); reprinted in *Social History of American*

Benjamin Rush, a signer of the Declaration of Independence and a participant in the Constitutional Convention drew the connection between education and preservation of a republican form of government:

> Freedom can exist only in the society of knowledge. Without learning men are incapable of knowing their rights, and where learning is confined to a few people, liberty can be neither equal nor universal.[39]

Indeed, as Chief Justice John Marshall observed, "In governments entirely popular" general education "is *more indispensable* . . . than in another."[40]

Justice Brandeis summarized this concern of the Founders in *Whitney v. California,* 274 U.S. 357 (1927). As Justice Brandeis observed, "Those who won our independence believed that the final end of this state was to make men free to develop their faculties." 274 U.S. at 375-76 (Brandeis concurring).

This Court's recent ruling in *Ambach v. Norwick,* 441 U.S. 68 (1979) reiterates and expands upon the concept that some quantum of education is indispensible to the preservation of our free society. In upholding a citizenship requirement for public school teachers this Court noted that "[P]ublic school teachers may be regarded as performing a task 'that go[es] to the heart of representative government'." *Ambach, supra,* at 75-76 citing *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). The Court further observed that "public education, like the police function, fulfills a most fundamental obligation of govern-

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Education, Volume: Colonial Times to 1860, (Vassar, Rand McNelly & Co.).

[39]B. Rush, "Education Agreeable to a Republican Form of Government" (1786); reprinted in *Social History of American Education, Volume: Colonial Times to 1860,* (Vassar, Rand McNelly & Co.).

[40]Letter of John Marshall to Charles Mercer, April 7, 1827; reported in A. Beveridge, "The Life of John Marshall", Volume IV, p. 472. (Emphasis added).

ment to its constituency." *Id.* at 76, citing *Foley v. Connelie*, 435 U.S. 291, 297 (1978), and finally concluded that the Court's observation of the fundamental nature of education was a shared view:

> These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

Ambach, supra, at 77 (citation omitted).

This recognition of the fundamental nature of education rests upon the fact that *society* cannot long survive without an educated populace. A second, more individualistic, foundation also compels such a recognition. When public schooling is available to all but the children of one excluded class, the members of that class are inexorably relegated to a low station in life, subject to exploitation and removed from the meaningful discourse of the day. As one is properly and regularly reminded, "A mind is a terrible thing to waste."

In a simpler time of history it might have been possible to argue that some level of public schooling was not essential to the fulfillment of the promise in our Declaration of Independence that "all men" are entitled to "life, liberty and the pursuit of happiness",[41] it was not until the latter half of the Nineteenth Century that free public schooling became universally available.[42] Once made universally available, the denial of schooling to a discrete class of children or to a given child effectively cripples his ability to compete for the fruits of a free society.

Society was also simpler in the early Nineteenth Century. Access to schooling was not as essential to the

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[41]The Declaration of Independence "The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States" G.P.O. (1877).

[42]D. Tyack, "The One Best System: A History of American Urban Education", Harvard University Press, Cambridge, Mass. (1974) pp. 66-67.

opportunity to survive and prosper. By 1954, this Court observed, however, that

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

This observation is even more appropriate twenty seven (27) years later in an increasingly complex world.[43] The exclusion of a child from any access to elementary or secondary education in the context of 1981 is an affirmative act by the State limiting the child's life chances sub-

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[43]No stronger testament to the recognition that some form of schooling is viewed as basic to an ordered liberty is the fact that, with three exceptions every State Constitution in the Union provides for the right of free public elementary and secondary education. See Ala. Const. art. XIV, § 256; Alaska Const. art. VII, §1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VII, § 1; Del. Const. art. X, § 1; Fla. Const. art. XII, § 1; Ga. Const. art. VIII, § 2-6401; Hawaii Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 12; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. XII; Me. Const. art. VII, § 1; Md. Const. art. VII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Min. Const. art. VIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 6; Nev. Const. art. XI, § 2; N.H. Const. pt. 2 art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art XII, § 1; N.Y. Const. art. XI, § 1; N.C.. Const. art. IX, § 2; N.D. Const. art. VIII, § 147; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Ore. Const. art. VIII, § 3; Pa. Const. art. I, § 14; R.I. Const. art. XII, § 1; S.D. Const. art. XIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 64; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art VII, § 1. Three States, Alabama, Mississippi and South Carolina removed similar provisions from their Constitutions in an effort to evade this Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954).

stantially. Nothing is more basic to the concept of liberty embodied in the Constitution than the right to be free from such a governmental allocation of life chances. *Whitney, supra,* at 375."

In apparent recognition that some quantum of education is fundamental, the State nevertheless chooses to argue that schooling is not fundamental for undocumented children. They argue that since undocumented children will be unable to vote or hold office their education is unnecessary to the preservation of the rights upon which this Country is founded. They also argue that since undocumented persons are prohibited from employment they have no liberty interest in the freedom to develop their capabilities. These arguments are based upon a basic misunderstanding of why education is fundamental.

As the above-cited authorities make clear, the fundamentality of an interest is predicated upon the closeness of its relationship to the preservation of the Nation and only incidentally upon the meaning of its deprivation to the individual Plaintiff. In *Dunn v. Blumenstein,* 405 U.S. 330 (1972), for example, this Court measured a durational residency requirement for voting against strict scrutiny. While no doubt Mr. Blumenstein endured some suffering by having to wait one year to vote in Tennessee it was not that impact on him or the class he represented that led to such review; rather, strict scrutiny flowed from the fact that this was an incursion upon an interest deemed preservative of our society, the right to vote. Similarly, the fundamentality of education cannot, nor should it be, dependent upon the vicissitudes of who is asserting it. The peril to the Nation is the same whether the State deems to exclude undocumented children or some other class. In

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"The prohibition of titles of Nobility in the Constitution is but one manifestation of the intent by the framers of the Constitution to assure that one's life chances are not determined by one's status, Article I § 9(8). See also The Federalist Papers, #39, p. 242, Mentor Books, New York, (1961).

either event the State reaps a harvest of intellectually inert, illiterate, unassimilated and invariably hostile persons. *Cf. Whitney v. California*, 274 U.S. at 375-76.[45]

In any event, it is much too narrow to view the political preservation of a society or even the political participation of an individual as being focused exclusively on the ballot box. It cannot be said that the only "political act" is one of voting or holding office. The individual in our society, whether he resides here lawfully or unlawfully, has a variety of contacts with the body politic and more particularly has rights that he is entitled to exercise. Minimally these include those rights granted under the Due Process Clause. *Mathews v. Diaz, supra.* The exclusion from schooling and the relegation to illiteracy make a mockery of this Court's recognition of those rights.

Nor does the Federal Government's prohibition against employment by undocumented persons justify a State policy which effectively relegates these children to a state of serfdom. The freedom implicit in the Constitution from governmental determinations of life status is not answered by suggesting that undocumented persons cannot be employed. The record first underscores the fact that most of these children will grow up and be employed in the

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[45]In their brief, the State argues correctly that the mere importance of an interest does not justify its recognition as fundamental, citing *Lindsey v. Normet*, 405 U.S. 56 (1972) and *De Canas v. Bica*, 424 U.S. 351 (1976). The State suggests that since neither housing nor employment has been declared a fundamental interest, there is no basis for recognizing some quantum of education as fundamental. Even assuming that *De Canas* held that there was no "right of employment" (an incorrect assumption as that was not the issue in the case), compelling reasons suggest that some quantum of education is fundamental although access to those others interests may not be. First, as reflected above, the authors of the Constitution recognized the nexus between a minimal level of education and the preservation of the Republic. Secondly, the impact of education upon the meaningful exercise of First Amendment rights and broad participation in the political process is direct and unambiguous. The same cannot be said for those other two interests.

United States either before or after adjusting their status (see generally JA B-7-8; JA B-56-59; JA B-61-62. Wherever a given child may ultimately reside he will carry the badge and scare of State exclusion with him.

The record further reflects that the denial of education to undocumented children is likely to be more devastating to both them and society, than the exclusion of generally less disadvantaged children. As Jose Cardenas, a prominent Texas educator and a witness for the Plaintiffs testified

> Well, I think that a child from an affluent family may have the resources for providing employment either with the financial resources available to the family or else be able to move into some kind of position that would be not available to a person that would come from a poor background. Mexican-American, because Mexican-Americans are more systematically excluded from the higher-paying positions in most areas of Texas employment, and Texas, because I think that Texas, as described earlier by another witness, the ethnic or racial strife in Texas is, perhaps, more acute than it has been in other States, so, in general, a poor Mexican-American in Texas would be very severely hampered by the lack of an education.

JA B-42.

Not mentioned by Dr. Cardenas was the socializing role of the public school and its especial importance for immigrant children. The public school provides virtually the only opportunity that many of these children will have to interact with the majority society and to learn of the history and culture of the Nation. As noted by this Court in *Ambach v. Norwick*, 441 U.S. at 77, public schools serve as "an assimilative force by which diverse and conflictive elements in our society are brought together on a broad but common ground." The exclusion of these undocumented children from access to the public schools will assure that

they not be brought together, but rather remain isolated, illiterate outlaws, ignorant of the customs and foundations of the Country.

In sum, the strength of this Court's precedents and logic compel a holding that education is fundamental for all children and that the absolute denial of any schooling needs be subjected to strict scrutiny. As discussed in Section III, *infra*, this legislation fails to meet even a relaxed standard of review. It certainly cannot survive strict scrutiny.

B. Legislation That Visits The "Wrongs" of Parents On Their Innocent Children In Such A Drastic Manner Is Deserving of Heightened Scrutiny

The undocumented status of the children who comprise the Plaintiffs' class is a status for which those children are not responsible. They were brought here by their parents. As children, they have neither the power nor the right to determine their place of residence;[16] today, because of their residence, Section 21.031 denies them an education—a service universally recognized as basic to a child's development.

It is as fundamental that "in our jurisprudence guilt is personal" *Scales v. United States*, 367 U.S. 203, 224 (1961); *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Healy v. James*, 408 U.S. 169, 185-86 (1972).

In *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) the Court struck down a school board regulation which permitted the suspension of students for the misconduct of their parents; that Court observed,

> Freedom from punishment in the absence of *personal* guilt is a fundamental concept in the American

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[16] In *Arredondo v. Brockette*, 648 F.2d 425, 431 (5th Cir. 1981), the Court noted, "Under Texas common law a minor is 'not *sui juris* and can neither select nor change its domicile, which is fixed by law as that of its father.' *Smith v. Ansley*, 257 S.W.2d 156, 157 (Tex. Civ. App.—Waco 1953, Writ ref'd n.r.e.)."

> scheme of justice. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification . . .
>
> . . . Traditionally, under our system of justice punishment must be founded upon an individual's act or omission, not from his status, political affiliation or domestic relationship. [footnote omitted; emphasis in original]

In *Lalli v. Lalli*, 439 U.S. 259, 265-266 (1978) this Court ruled that classifications involving illegitimate children must be "substantially related to permissible state interests" and "carefully tuned to alternative considerations." Citing *Trimble v. Gordon*, 430 U.S. 762, 772 (1977). The primary basis for this heightened standard of scrutiny of illegitimacy classifications is that they punish children for a status for which they bear no responsibility.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court explained its basis for striking a Louisiana statute which denied certain illegitimate children the right to equal access to worker's compensation death benefits:

> The status of illegitimacy has expressed through the ages society's condemnation of responsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is *contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.* Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. at 175 (footnotes omitted; emphasis added). See also *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee Co.*, 390 U.S. 73 (1968).[17]

[17] It is argued by the State that the immutability of the status of illegitimate children distinguishes them from the instant Plaintiffs.

Like the illegitimate child in *Trimble v. Gordon*, 430 U.S. 762 (1977) one can say of these undocumented children that

> The parents have the ability to conform their conduct to societal norms but their children can affect neither their parents conduct nor their own status.

430 U.S. at 770.

When measured against this middle level of scrutiny this legislation must fall. Surely this legislation, in its purported goal of limiting unlawful immigration bears "only the most attenuated relationship to the asserted goal". *Trimble, supra,* at 768. Witnesses from all parties agreed that the enticement of education is of minimal consequence in stemming undocumented immigration (see e.g. JA A-33, B-6, B-65). As is more fully discussed in the next section the removal of undocumented children from school districts does not reallocate resources to needy school districts and surely is not "carefully tuned to alternative consideration". *Trimble* at 772. In sum, this legislation fails to meet the standard appropriate for review of classifications that penalize the innocent for the acts of others. The undocumented children in this case are being so punished.

To the extent that these cases rest upon immutability such is not a distinguishing feature. These children have no power of their own to remove the disability by changing their residence. Thus for them the situation may be absolutely immutable. In any event, immutability has never held the cornerstone for according heightened scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 9, n.11. See also *Parham v. Hughes*, 441 U.S. 347 (1979), in which this Court upheld an illegitimacy classifier that precluded benefits to the *father* of the child, distinguishing *Trimble, supra,* and *Weber, supra,* on the ground that "*the basic rationale* of these decisions is that it is unjust and ineffective for society [to punish the] child who is in no way responsible for his situation and is unable to change it." *Parham, supra* at 352. [Emphasis added]

C. Heightened Scrutiny Is Appropriate for Alienage Classifications

The very uniqueness of this unprecedented exclusion of these children provides a stark reminder of the reasons that this Court has reviewed with special scrutiny discrimination against aliens. While this Court's recent decisions lowering the level of scrutiny for alienage classification which have a political nexus might suggest that this alienage classification *per se* does not justify strict scrutiny, a passive review of the classification would do gross violence to the principles that underlie the alienage decisions. As observed in the seminal "Strict Scrutiny" case:

> prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for correspondingly more searching judicial inquiry.

U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

Legislation such as Section 21.031 with its gross disparity between the questionable benefits to those remaining in schools and its unquestioned calamity to the Plaintiff children can hardly be imagined visited upon any but the most politically powerless.

The primary underpinning of *Graham v. Richardson*, 403 U.S. 365, (1971) and its progeny, *Sugarman v. Dougall*, 413 U.S. 634 (1973), *In Re Griffiths*, 413 U.S. 717 (1973), *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), and *Nyquist v. Mauclet*, 432 U.S. 1 (1977) is the recognition that aliens are politically powerless and that lack of power has traditionally occasioned arbitrary scapegoating. If the premanent resident aliens referred to in those decisions suffer such disability those who are subject of this legislation suffer it ten-fold. The permanent resident alien can at least speak out and lobby his cause. The undocument alien must suffer injustice silently. Indeed the

very lack of cases brought by undocumented persons under the Equal Protection Clause is a manifestation of their inability to avail themselves of basic legal processes."[48]

If further proof of this need for heightened judicial protection be necessary, the record provides it. The testimony of Prof. Gilbert Cardenas of the University of Texas traces the cyclical patterns of encouragement of illegal immigration to this Country for the purpose of obtaining cheap labor and then resort to brutal deportation efforts during time of economic distress.[49] The testimony documents that it has been a traditional pattern to accept the toil and taxes of undocumented persons but to deny them access to basic services.[50]

The State argues that we are not here confronted with an alien-age classification but rather one of "residency."[51] They argue that an undocumented person cannot become a resident and that residence requirements are permissible. *Vlandis v. Kline*, 412 U.S. 441 (1973). The argument is circular. If undocumented children are "persons within the jurisdiction" for purposes of the Equal Protection Clause

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[48]See e.g. Ortega "The Plight of the Mexican Alien" 58 ABAJ 211 (1972).

[49]JA B-1-8.

[50]See generally the testimony of Prof. Gilbert Cardenas (JA B-1-8) and that of Marion Houstoun (JA B-13-25). The existence of such exploitation, for example, led the Mexican government to refuse to include Texas in the bracero program between 1943-47. See R. Acuna, "Occupied America", Canfield Press, San Francisco, 1972, pp. 169-170; See generally O. M. Scruggs, "Texas and the Bracero Program", Pacific Historical Review, August 1962.

[51]One amicus, The Legal Foundation of America, argues that no alienage classification is at issue because of a regulation that they imply the Texas State Board of Education adopted and which purportedly would permit a child to attend school if his parents applied for legal status. The regulation was proposed for adoption on March 20, 1980, but has *not* been adopted.

the State cannot say that they are not residents because of their status. "If a state wishes to borrow a Federal classification it must seek to rationalize the adopted distinction in the new setting . . . The state's use of the distinction must stand or fall on its own merits." *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy concurring); *Takahashi v. Fish Comm'n*, 334 U.S. 410 (1948). Many of the children affected by this legislation, including the named Plaintiffs meet any legitimate residency test as they have been in the State and in their school district a number of years. They cannot be stripped of that by the State adoption of a Federal classification. For children who are *not* residents, a school district has the unquestioned authority to deny them admission. *Arrendondo v. Brockette*, 648 F.2d 432 (5th Cir. 1981). For those who are residents, an irrebuttable presumption of non-residency based upon their Federal status is impermissible. *Vlandis, supra.*

In sum, heightened scrutiny is an appropriate measure of this legislation. Heightened judicial solicitude for those who are politically powerless is a tradition based upon a solid foundation that is not broken by the mere fact that these aliens are undocumented.[52] Application of heightened scrutiny compels a ruling that Section 21.031 is unconstitutional.

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[52]The State argues that it would offend some equitable notion if classifications affecting undocumented persons were subject to heightened scrutiny, while classification of some others did not receive such a review. This misapprehends the role of heightened scrutiny. Such scrutiny of suspect classes is not designed to give those classes an elevated position in the eyes of the law; rather it is founded upon the recognition that the classifier is frequently based on an irrelevant characteristic, such as race, or is the product of a one-sided political debate. See generally, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065 (1969).

III

DENIAL OF EDUCATION TO CHILDREN WHO ARE SIMILARLY SITUATED TO THEIR CLASSMATES IS NOT RATIONALLY RELATED TO A PERMISSIBLE STATE PURPOSE

The State offers two (2) justifications for this legislation in their brief to this Court. First, they suggest that the exclusion of undocumented children from school is a reasonable manner to allocate scarce resources. Secondly, they suggest that this legislation is permissible as a means of limiting immigration.[58] This section addresses the first contention. In Section IV will be addressed the second.

It is not disputed that some Texas school districts have problems. Some are underfunded, some are overcrowded and some are in need of bilingual teachers. Yet to single out undocumented children for exclusion as a means of solving these problems is merely to decide that certain children are "deserving" while others are not. Whether viewing these children and their families individually or as "undocumented," no feature distinguishes them from any other children.

Equal Protection requires some meaningful difference between those fenced out and those included; as observed by Justice Jackson in *Railway Express v. New York*, 336 U.S. 106, 115 (1949) (Jackson concurring):

> The Equal Protection Clause ceases to assure equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free . . . [T]he differentation must have an appropriate relation to the object of the legislation . . .

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[58]The justifications for this legislation change with every Court appearance. For example, in her closing argument on the hearing for preliminary injunction, the Attorney General flatly stated that "the basis behind our statute . . . [is] not an effort to control immigration" (JA A-63). In her opening statement at the Trial on the Merits she attributed the concern of the State to "costs in

The differentation between documented and undocumented bears no such relation. In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) this Court observed that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 413 U.S. at 534. In making the determination to deny schooling to these children based upon a notion of who is deserving and who is not, rather than any objectively distinguishable characteristic, the Texas legislature has fallen prey to either habit or political expendiency. Neither is sufficient justification for this legislation.

The facts in evidence show that: (a) Rather than reallocating resources to needy children in financially pressed school districts this legislation is likely to *reduce* financial resources available to those districts; (b) Undocumented children are likely to remain in the United States whether or not Texas provides them an education; (c) Undocumented families contribute to the school's tax base in the same manner as other parents; and (d) Educationally, the undocumented child is indistinguishable from his classmates.

Each of these facts, documented fully by the record, establishes that Section 21.031 is not a reasonable scheme to achieve the goals it allegedly advances.

A. A State Statutory Scheme Which Withdraws State Assistance From Local School Districts Is Not Reasonably Designed to Enhance the Financial Resources Available to Those Same Districts

The basic assumption underlying the opening statement of the State and advanced in its brief is that the statute

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terms of lost textbooks, removed textbooks, problems you would not have with the ordinary student" (JA B-48). This difficulty of the State's attorneys is understandable in light of the fact that no studies preceded the adoption of the statute, which adoption was accomplished by a voice vote without debate. *In Re Alien Children*, 501 F.Supp. 544, 555 n.19.

reflects an effort by the legislature to reallocate scarce economic resources for the educational benefit of children in districts burdened with problems. If this is what the legislature intended to do, it failed miserably.

This failure to achieve the purported goal can be traced to two factors, one, apparent on the face of the legislation, and the other, requiring testimony explaining the Texas school financing scheme.

Facially § 21.031 does not exclude undocumented alien children; rather, it denies local school districts access to the State treasury to cover the cost of their education. It further permits local school districts the right to exclude those children or to admit them on the payment of tuition.[54] In practice the legislation states, "We don't care what you do with undocumented children. However, if you do choose to educate them, don't look to us for help."[55] This hardly represents a reasoned effort by the State legislature to achieve the purported end of expanding resources available to school districts for the education of other children.[56]

While facially the statutory scheme reflected in section 21.031 is contradictory of its professed goal, it is important also to understand the somewhat hidden consequence of

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[54]In practice, of course, very few school districts could continue to educate these children without access to the State treasury or the imposition of tuition. All concede that most of these children come from impoverished conditions (JA A-53, B-8-10, B-16, B-66); thus, the choice to charge tuition is tantamount to exclusion (JA B-78).

[55]In her closing argument on the hearing for preliminary injunction the State's Attorney conceded as much; as she noted "The enforcement of this statute happens to be aimed at the Tyler Independent School District that does not collect money because these children cannot be included in the ADA, so they don't collect money from them, so if they're in school, the money comes out of the Tyler Independent School District's pocket. It doesn't come from the State treasury." (JA A-63).

[56]It is of interest that the State treasury had a surplus of one to two billion dollars in 1977 (JA B-93-97).

this policy. In order to appreciate these consequences, it is necessary to understand some basic facts about school financing in Texas.[57]

There are three (3) sources of school district income; federal, state and local. In Texas, approximately 55% of a school district's educational income is from the State, 38% is locally generated, and 8% derives from federal programs (JA B-32).[58] There are two (2) major aspects of State aid. First, the State contributes, through its foundation programs, a set amount to each school district for every student enrolled in the district. That sum is approximately $100 per student (JA B-33). More importantly, the foundation program also includes a formula which allocates money for a teacher for approximately twenty (20) children (Id.).[59]

The second aspect of the State aid is the equalization formula. This formula, designed to partly equalize funding between rich and poor districts, allocates State aid according to property wealth per average daily attendant students in school (ADA) (JA B-33-34).

While each of these formulas vary, there is one consistent factor which triggers State aid to a school district. That factor is average daily attendance (JA B-25-34, B-74-75). Stated simply, a school district loses money every time it excludes a student from its schools; and a poor school district loses more money than a wealthy one because of the equalization aspect of the State funding formula.[60]

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[57]This synopsis is taken from the uncontradicted testimony of Robert Firestine, a recognized expert in the area of school finance. See generally, JA B-25-34.

[58]These are average figures. In Tyler, the Superintendent estimated that 30% of their income was locally generated (JA A-51).

[59]The Deputy Superintendent of the Houston ISD indicated that "There's a division of 19 for grades K through three, 21 pupils four to six; 20 pupils seven to grade nine; 18 pupils ten to grade twelve." (JA B-75).

[60]Dr. Firestine explained this would "occur because as numbers of students that were counted in attendance in a school district

If the reduction of students and thus income were accompanied by a greater reduction in costs, additional resources might be available for other students. No evidence in the record shows that this is likely to occur; in fact, all evidence points to the contrary.

The expert testimony of Dr. Robert Firestine and the experiential testimony of the two school district administrators presented by the Defendants documents the fact that costs rarely are reduced as much as the loss of income. Dr. Firestine testified that administration costs and fixed maintenance constitute on the average twenty-five percent (25%) of current operating expenditures. With respect to these costs, he concluded, "We cannot presume that specific expenditures for maintenance operations and for administration would commensurately decline—that is, school buildings still have to be maintained in the usual way" (JA B-29).

Dr. Firestine also found that debt service would remain steady notwithstanding the drop of income due to exclusion.

Approximately sixty-eight percent of current public school expenditures are attributable to teachers and aides. Dr. Firestine testified that sizeable reductions in a given grade at a particular school are necessary before even one teacher can be released (JA B-30-31); even then, tenure provisions result in the release of less experienced, "cheaper" teachers and aides (JA B-30). In sum, even those costs which one would expect to be reduced commensurately with a reduction of students are not so reduced.

In concluding his testimony, Dr. Firestine was asked, "Given the formula based on students in attendance and given the intransigence of costs, is it possible that a State law which resulted in exclusion of certain students from

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were reduced, the school district would then appear to be more wealthy in terms of its property wealth per student. In that case, the district, as it appeared to become more wealthy, even though the actual property value in the district had not changed—its actual equalization would thereby be reduced." (JA B-33-34).

school could result in placing a school district in a greater financial squeeze than it was before?" His response was, "Yes, I think in general that would be true within the State and certainly it's true across the country." (JA B-34).[61]

The general validity of Dr. Firestine's analysis was supported by witnesses for the Tyler ISD and the State of Texas. Jim Plyler, the Superintendent of Tyler ISD, at the September hearing admitted the intractability of fixed costs (JA A-51); at the December hearing, Dick Lindsey, the Business Manager for the Tyler ISD, reaffirmed this conclusion, agreeing that, "You would, in fact, need a fairly significant number of students in a particular given grade or a given school before you could produce any savings by excluding children from school." (JA B-44).[62] Notwithstanding the alleged exclusion of 4,000-5,000 undocumented children in the Houston Independent School District (HISD) (out of 206,991) (JA B-70), the Deputy Superintendent could not point to any reduction in teachers (JA B-73), nor to any reduction in the bilingual program (JA B-73).

Likewise, it was necessarily conceded by all that State funds were triggered by student enrollment, that the exclu-

[61]Dr. Firestine did condition the conclusion on a "moderate decline" in enrollment. However, if one reads his entire testimony, it is clear that he meant that a moderate decline would be unlikely to be met with "commensurate" savings. See e.g. his testimony at JA B-29 in which he concludes that these two costs and debt service are "unaffected by declining enrollments."

[62]At the December hearing Mr. Plyler testified that the addition of the Plaintiffs through the preliminary injunction had "tipped" the number of students in the district who were in need of bilingual education over the threshold required by the State to establish a bilingual program (Dec. T. 151). On cross-examination it was conceded that of the three teachers who were hired to meet this need, (a) Not all three were required (JA B-45); (b) One was paid with federal Title I funds (JA B-46-47) and the other would be covered by the State through the foundation program (JA B-46), and (c) Most importantly, the establishment of the program had been a "desirable thing . . . to meet the needs of the youngsters." (JA B-45).

sion of students would result in the loss of income and any increase would be met with a substantial amount per student, including funds for a teacher "plus M and O" (maintenance and operation) for approximately every twenty children (JA B-45-46; B-74-75).

Thus, school districts in general and poor school districts in particular have had their financial resources squeezed rather than expanded by Section 21.031. If it was the purpose of the State legislature to expand resources available to school districts to aid those children considered deserving, it did not accomplish that result. The denial of ADA for undocumented students has achieved the opposite result for many school districts. This lack of nexus between the professed justification for this legislation and its consequences is expectable. Legislation which facially professes its disinterest in the education of innocent undocumented children by closing State coffers to those who choose to educate them is bound to hurt all children.[63]

B. Undocumented Persons Financially Support Schools on the Same Basis as Other Residents of Texas

It has never been permissible to tie access to State services to tax contributions. As this Court observed in *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969):

[63]The State in its brief on the Merits seeks to establish Brownsville as an example of a district which has been seriously impacted by undocumented children. Brownsville, was the only school district of approximately 1100 in the State that sought to avail itself of a stay pursuant to Justice Powell's order. In denying the stay the Court, in an unreported order, found that there were approximately 500 undocumented children in that district of a total of 27,120 students. It further held that while Brownsville certainly had many problems, they "would have been with the district in any case" *Brownsville Independent School District v. Certain Named and Unnamed Undocumented Alien Children*, #B 80-234 (S.D. Tex. Brownsville Div., filed Jan. 14, 1981). (Slip opinion, p. 8). The State in the instant case also tried without success to attribute the problem of the border districts to these children. Indeed their evidence reflected studies done *after* the exclusion of the children and showed that the problems had not been alleviated by their exclusion (JA B-87-89).

> [The State] may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. It could not, for example reduce expenditures for education by barring indigent children from its schools.

Nevertheless, it would seem to be an unstated foundation of this legislation that services can be withdrawn from those children because of their lack of tax contribution. Not only is such a rational legally impermissible, it rests upon a fallacious factual foundation.

It is uncontested that local funds for schools in Texas are primarily derived from property taxes. To the extent that undocumented alien parents own homes, they pay these taxes directly. Mr. Doe, one of the Plaintiffs, fits in this category (P. Ex. 6, Sept. T. 93). To the extent that undocumented alien parents rent, they pay property taxes through their rent. Thus, like all other persons in a community, these parents contribute to the local fund.[64]

State contributions to schools come directly and indirectly from consumer taxes, which are levied on diverse consumer goods. (JA B-90-92). Undocumented alien parents pay these taxes just as do all others.

The evidence also reflects that undocumented aliens generally pay social security and have federal taxes withheld from their wages. (JA B-18-19).[65] Thus, to the extent that

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[64]A given parent may pay more or less taxes than his neighbors. While of course, it would be impermissible to condition tuition on the size of the contribution, the evidence reflects no such effort (JA A-52).

[65]The State apparently does not dispute the tax contributions to state and local treasuries. They did present an opinion by Mr. Heston of the Immigration and Naturalization Service that many undocumented workers do not pay federal taxes (JA B-57-58). His ad hoc conclusions contrast sharply with the North-Houstoun study which reached a contrary conclusion. (JA B-18-19).

this legislation is founded upon an assumption that undocumented aliens do not contribute tax revenues to the schools it rests on a false assumption.

C. Undocumented Children Are Likely to Remain in the United States Whether Or Not They Are Educated

The State of Texas argues that it has no interest in educating those who will not remain in Texas. While certainly the State has the right to condition receipt of services on *present* residency, *Vlandis v. Kline*, 412 U.S. 441 (1973), the use of an irrebutable presumption that undocumented persons will not remain in the future is contrary to experience as reflected in the unrefuted testimony presented at trial. Indeed, absent resort to a sooth-sayer or an overly broad generalization as we have here there can be no principled substitution for a determination of bona fide *present* residence. The State, without need to resort to Section 21.031, already has the full capability to accomplish this task. *Arrendondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981).

Most importantly, this *post haec* justification for the legislation is defied by the facts. All witnesses agreed that the provision of education had little influence in the decision to come to this country or to remain. Economic considerations are the dominant factor. Shane Davies, an expert witness for the State was asked whether "the Texas policy of excluding the illegal alien child from free public education . . . affect[s] immigration." His answer was, "as an attractive index, No". (JA B-65).

Ronald Heston, Regional Director of the I.N.S. was asked by the Attorney General:

> Q. You say the main reason they come into the States is to obtain employment. In your dealings with the aliens who have come, those who have been undocumented or have been sent back, have you ever learned that there is a majority that are discouraged from coming into the State, because they don't have free education here for illegal aliens?

A. That are discouraged from coming because they don't have free education?

Q. Right, is that a big discouragement to illegal immigration?

A Not in my experience. This is not something I have encountered in my experience.[66]

Mr. Heston further observed that families with children of school age are very likely to be undetected. He stated, "From my experience and service experience, generally, they are excellent workers, work long hours: they go home and come back early the next morning . . . [G]enerally they stay away from Immigration Service, and especially those that have families here are not out to where their status may become known . . ." (JA B-57).

Possibly of even greater importance, today's undocumented person tends to become tomorrow's documented one. First, many of those who have been here for seven (7) years can readily adjust their status to permanent residency (JA B-61-62); secondly, for whatever reasons persons who spend their time in the United States as undocumented tend to become those persons who subsequently become documented; witnesses for the Plaintiffs and the State acknowledged that today's legal immigrant frequently was yesterday's illegal alien. In reporting on a study of legal immigrants from Cuba and Mexico that he had coauthored, Prof. Gilbert Cardenas testified, "Fifty or sixty percent of the sample had previous residence in the United States prior to legal admission." (JA B-6). See also testi-

[66]JA A-33-34. Having gotten this unexpected response from her own witness, the Attorney General did coax a statement from the witness that free schooling "wouldn't discourage" additional immigration. JA A-33-34. The State notes correctly in its brief that various witnesses observed that some parents might be "pulled" over the border by the attraction of education. However all witnesses testified that any pull would be speculative and certainly weak. (See e.g. JA B-6-7, B-65). The pull toward Texas is even more speculative given the fact that all other States provide free public education to all children.

mony of Jose Cardenas (JA B-42); Roland Heston, Regional Director for the Immigration and Naturalization Service, upon being asked whether some people now being admitted legally were here previously in an undocumented status states, "Oh, yes, that's true" (JA B-61).

Further, in addition to this evidence that the State merely spites itself (and other States to which these children may subsequently move as adults) by creating a cadre of illiterate residents, notice should be taken of the existence of pending federal legislation addressing these problems. The Carter administration and now the Reagan administration have submitted to Congress proposed legislation to reform our immigration laws. Both the Carter legislation [S.B. 52252 and HR 9531, (1978)] and the legislation unveiled by the present administration[67] propose amnesty for persons who are already in the Country. While neither bill has become law the fact that each submission has included such a proposal indicates its likelihood of being part of any final legislation. These children, presently excluded from an education by virtue of Section 21.031 would become lawful residents and be entitled to remain under these approaches.

Thus, to the extent that this legislation proceeds upon an assumption that those deserving of a Texas education are only those who will remain, it rests on a mistaken hypothesis that further points out the irrationality of this legislation. Many of these children will remain. If they are educated, they will add to the intellectual and economic life of Texas. If they are not educated, the cost in terms of lost human potential, tax potential, and likely socially undesirable behavior will haunt not only the State of Texas but the Nation as a whole.

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[67]Office of the White House Press Secretary, Statement by the President (July 30, 1981); See also p. 9 of the typed brief of the United States in this Court.

D. Undocumented Children Are Educationally Similarly Situated To Their Classmates

Undocumented children are educationally similar to children who are afforded an education by Texas. Many of the children excluded by this legislation have been in this Country virtually their entire lives and have attended only American schools. (See e.g. JA A-7, A-16, A-23, A-28). Many of the children like the Doe children, are fluent in English and are able to progress through the educational system with little or no supplemental assistance; others, of course, are recent immigrants who may need supplemental assistance. In this regard they are no different from other immigrant children and many citizens.

Dr. Jose Cardenas, an educator who testified for the Plaintiffs, testified that the undocumented recent immigrant "requir[ed] a similar school response" to that appropriate for other recent immigrants. Indeed, Dr. Cardenas made an observation common among educators familiar with the recent upper-aged immigrant when he noted

> it has been our experience that in the education of alien children they tend to perform at levels much higher than American-born minority children. In general, they perform better than American-born and race minority children.

(JA B-40).

Jim Bob Hensley, the witness called by the State to describe the problems of the border school districts testified that "along the border where eighty percent of the population is Mexican American, . . . the educational program (for recent immigrants) is pretty much the same" (JA B-88-89).

John Eaton, the witness called by the State to describe the situation in Houston was instructive on this point. Mr. Eaton used the terms Latin-American, Hispanic, migrant and illegal alien interchangeably when "describing" the educational characteristics of undocumented children (JA B-69-72). Mr. Eaton also agreed that recent immigrant chil-

dren needed bilingual instruction irrespective of their immigration status as do many children who are born in this Country (JA B-75-76).[68]

In sum, undocumented children are individuals whose educational needs cannot be described by reference to their immigration status. Any effort to do so, and especially any effort to exclude them from school because of the artificial attribution of certain characteristics is irrational.[69]

IV

THE DISCOURAGEMENT OF UNLAWFUL IMMIGRATION IS NOT A PERMISSIBLE PURPOSE FOR THE STATE TO ASSERT IN DEFENSE OF SECTION 21.031

As an afterthought,[70] the State now asserts that Section 21.031 is an effort to stem unlawful immigration. The facts belie the assertion. More importantly, however, such a purpose cannot stand as an independent basis for sustaining this legislation against an Equal Protection challenge. Only the Federal Government has the power and right to regulate the flow of persons acros a national border.

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[68]The attribution of certain educational characteristics to undocumented children found in the State's statement of facts is based generally on this testimony of Mr. Eaton concerning "migrants". See n.26, *supra*. The State's further assertion that undocumented children are "double trouble" since they may not have school in Mexico is an unfocused assertion since many of these children have been in the United States all their lives, and many, no doubt, have attended school in Mexico just as their documented immigrant classmates.

[69]The State fails to mention in its brief that it receives substantial sums from the Federal Government to aid students—all students—with special needs. In 1977, the State received 148 million dollars pursuant to Title I of the Elementary and Secondary Education Act alone. (JA B-50).

[70]See n.67, *supra*. Further indicia that this justification is of recent origin is the fact that the Texas legislature has taken no steps, as have other states, to penalize employers for the employment of undocumented persons. Without arguing the merits of such legislation it would seem to be the first step for a state purportedly concerned with halting employment-based unlawful immigration.

In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) this Court observed:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.*

142 U.S. at 659 (Emphasis added).

This power of the *Federal* Government, as an incident of its sovereignty, to regulate its borders has been repeatedly recognized. *The Chinese Exclusion Case*, 130 U.S. 581, 608 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1940); cf. *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976).

In recognition that the regulation of the borders is a matter reserved for the Federal Government, this Court has regularly struck down State laws that seek to regulate the flow of traffic across the Nation's border. For example, in *Chy Lung v. Freeman*, 92 U.S. 275 (1875) this Court held that a State statute which required disembarking passengers to post a bond violated the Constitution. The Court ruled,

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations; *the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the National Government.* If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

92 U.S. at 280 [Emphasis added]. See also *Passenger Cases*, 48 U.S. 283 (1849); *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

It is true that not every State law that has some affect on immigration is preempted. As stated in *De Canas v. Bica*, 424 U.S. 351 (1976) "If—local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . ." *Id.* at 356. One must distinguish however between State enacted legislation which has an *incidental effect* on immigration and State enacted legislation which has as its *purpose* the regulation of the flow on persons across the border.

To permit a State, as in the instant case, to advance independently as against an equal protection challenge, the objective of restricting unlawful immigration would be to permit a State to take a national problem into its own hands. It is just such a result and its potential implications for international relations that lies at the foundation of this Court's decisions upholding the exclusive authority of the Federal Government to regulate the Nation's borders.

At issue in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), was whether a State statute denying State college scholarships to those who refused to declare their intent to become citizens violated the Equal Protection Clause. One justification offered by the State was that the statute encouraged persons to become citizens. This Court summarily dismissed this justification as "not a permissible one for a state." 432 U.S. at 10. The State in the instant case requests this Court to sanction a law which much more directly regulates immigration than the statute involved in *Nyquist*. Too, it is fraught with substantially greater international implications. Should this State be permitted to justify this legislation on the grounds that it is seeking to regulate immigration little is to stop the other forty nine from the business of halting unlawful immigration. While statutes which incidentally affect the flow of the border may not be preempted, purposeful efforts to effect

that flow should not serve as a permissible independent rationale under the Equal Protection Clause.[71]

The State also argues that it is compelled to enact legislation such as 21.031 to implement federal laws which establish the terms and conditions for foreign students to attend schools in the United States. The establishment by Congress of a means to permit those resident in another country to attend schools in the United States does not provide guidance concerning whether undocumented residents of the State of Texas can be denied elementary or secondary education. Cf. *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976).[72]

A. THE IMPACT OF THE DENIAL OF SCHOOLING ON UNLAWFUL IMMIGRATION IS SPECULATIVE AND MINIMAL

This brief previously discussed the role of schooling as an attraction for unlawful immigration[73]. Suffice to say that the vast majority of persons come to this country because of the desperate financial conditions in their home country.

[71]The State argues in passing that if it does not enact legislation such as this it might be guilty of "harboring" undocumented children. 8 U.S.C. § 1324(a). This seems especially fanciful in light of the fact that this section has been in its present form, with penalties, since 1952, that none of the fifty States enacted legislation such as 21.031 until Texas in 1975, and that none of the more than 16,000 school districts in the Country has even been charged with "harboring". The most frequently cited authority defining "harboring" is *United States v. Lopez*, 521 F.2d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). It defined "harboring" as "intended to encompass conduct tending substantially to facilitate an alien remaining in the United States illegally, provided, of course, the person charged has knowledge of the alien's unlawful status." *Id.* at 441. Teaching a child reading and writing hardly fits this definition.

[72]The fact that the United States takes no position as to the constitutionality of section 21.031 pursuant to the Equal Protection Clause provides assurance that they do not view the congressional activity in this area as expressing a position on the issue at bar.

[73]See section III(C) *supra*.

They come for employment. While no doubt one can find a family for which education played a role in their decision to come to the United States, the record, reflects that their numbers are both speculative and small.

Further, viewing the situation from a national perspective, it is notable that no other state has a limitation similar to that of Texas. Thus the impact of Texas' policy, if any, is likely to result in increased immigration to other states, not any reduction in immigration *per se*. In sum, the State's own statement, and the lack of advancement of the objective of limiting unlawful immigration undercut the present assertion that this was an objective of Section 21.031. In any event such an objective is impermissible for the State of Texas.

V

SECTION 21.031 IS PREEMPTED AS IT CONFLICTS WITH AND FRUSTRATES FEDERAL EDUCATION POLICY

The primary objectives of federal education policy have been to assure that those most disadvantaged have a fighting chance to overcome their disabilities. "It presumes, as did the first U.S. Commissioner of Education, that 'Education prevents being poor' "[74] This legislation, which effectively denies any education to children with serious educational and economic disabilities, is likely, in the words of the State's witnesses, to create a "serf class"[75] This clash between the most basic goal of federal educational legislation and the Texas legislation mandates a finding that the Texas legislation has been preempted pursuant to the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

The Elementary and Secondary Education Act of 1965 (ESEA) was the first major effort by the Federal Government to address the existent educational needs of the

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[74]124 Cong. Rec. S14065 (August 23, 1978).

[75]Testimony of Shane Davies. (JA B-69).

disadvantaged.[76] That effort was the "flagship" legislation at the inception of the Nation's War On Poverty.[77] In setting forth the purpose of the initial ESEA, the Senate Report observed:

> The President, in his education message, stated that one of the four major tasks confronting us was to "bring better education to millions of disadvantaged youth, who need it most." The reported bill was designed to carry out this task.[78]

This is still the primary task of that legislation.[79]

Title I of the Elementary and Secondary Education Act is the cornerstone of federal aid to our Nation's elementary and secondary schools.[80]

> . . . [T]he central characteristic of the program is the way in which it directs funds to districts based on their numbers of low-income children, on the theory that poverty and low scholastic achievement are closely related.[81]

The ESEA targets funds to school districts and ultimately to schools on the basis of a poverty count. Once funds are allocated to a school, all children within the school who suffer educational deficit are eligible to participate in the program. This latter policy reflects an effort by Congress to allow sufficient flexibility at the local level to deal with the design or delivery of educational services.[82]

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[76]The ESEA has been reenacted with minor changes in approximately four-year cycles. Its last full authorization consideration was 1978. It presently is codified at 20 U.S.C. § 2701 *et seq.* See also, 95 Stat. 463 (The Education Consolidation and Improvement Act of 1981).

[77]124 Cong. Rec. S14065 (August 23, 1978).

[78]1965 U.S. Code, Cong. and Adm. News, 1450.

[79]124 Cong. Rec. S10465 (August 23, 1978).

[80]110 U.S. Code, Cong. and Admn. News, Dec. 1978, Legislative History, p. 4.

[81]*Id.*

[82]110 U.S. Code, Congress and Administration News, Dec. 1978, Legislative History, p. 4.

The goal of Title I remains today, as it did when President Johnson spoke, to "target . . . educational services to those who need them most."[83] As observed by Senator Javits, co-floor manager of the most recent reenactment of the ESEA, "The fundamental purpose of federal aid to education is to provide high quality educational opportunity to *all children* in the United States."[84] The final embodiment of that legislation continues the tradition of targeting funds on the basis of all poverty children between the ages of five and seventeen.[85]

The record reflects that undocumented alien children are among those children who are most in need. To deny them access to an education, as does the Texas legislation, clearly flies in the face of congressional efforts to alleviate the cycle of poverty through the provision of equal education opportunity to all children irrespective of their immigration status.

Title I presumes a correlation between poverty and educational need. Exhibits introduced into evidence clearly reflect the difficult economic circumstances of the named Plaintiffs.[86] Not surprisingly, the economic circumstances of the named Plaintiffs mirror the general condition of most undocumented aliens. Although most are employed, their employment tends to be in the low-paying sectors of the workforce.[87] As Dr. Marion Houstoun, co-author of the major study on illegal immigration, testified, even within those low-paying categories, undocumented aliens earned "two-thirds of the wages of U.S. workers comparably employed . . . (and) worked an average of 8.6 hours more per week than the U.S. workers."[88] If the Title I

[83]Statement by Senator Javits, ranking minority member of the Senate Subcommittee of Education, Arts and Humanities during debate on the most recent reenactment of the ESEA, 124 Cong. Rec. 14048 (August 23, 1978). See also 95 Stat. 464.

[84]124 Cong. Rec. 14048 (August 23, 1978) [Emphasis added].

[85]20 U.S.C. 2711 (a)(3)(D).

[86]See e.g. P. Ex. 2, 5 and 11, Sept. T. 58, 92, 123.

[87]See e.g. JA B-6, B-9, B-17-18.

[88]JA B-18.

presumption is correct, undocumented aliens are among those most in need.

The record in fact documents this need. While both Plaintiffs' and Defendants' witnesses agreed that in terms of need undocumented children were no different from their brothers who migrated with documents, all agreed that many had special needs.[89] Dr. Jose Cardenas, testified that virtually all new immigrants regardless of status needed bilingual education and other compensatory programs in order to obtain a fair chance at educational success.[90] Defendants' witnesses agreed.[91] In sum, the Record fully reflects that many of these children are among those who not only need an education to avoid economic disaster but indeed need the full benefit of the program that the Federal Government has developed. Dr. Davies testified that the exclusion of these children from an education would result in virtual serfdom. The Record supports him. It is just such a condition that led President Johnson to propose Title I of the Elementary and Secondary Education Act and subsequent Congresses to adopt it. The Texas legislation directly frustrates this purpose.

Other sections of the Elementary and Secondary Education Act reflect the congressional policy that children with the disabilities frequently ascribable to the Plaintiffs not be relegated to a position of serfdom. Most notable is a subcategory of Title I which allocates funds for migrant children[92] and Title VII which reflects a congressional concern for children whose primary language is other than English.[93] The children targeted for this latter program include, *inter alia*, "individuals who were not born in the United States or whose language is a language other than English."[94] The report of the Senate Committee reporting

[89]See e.g., JA B-38, B-75-76.

[90]JA B-38-39.

[91]See e.g. testimony of John Eaton, JA B-71.

[92]20 U.S.C. 2761.

[93]20 U.S.C. 3221.

[94]20 U.S.C. 3223(a)(1)(A).

on the most recent reenactment of ESEA enacted, "The Committee strongly believes that an effective bilingual education program ought to be implemented to benefit *all* children in need of such service throughout the nation."[95]

The one major expression of congressional educational policy not found in the Elementary and Secondary Education Act is the Education of the Handicapped Act, 20 U.S.C. 1412, *et seq.* That Act creates an entitlement for a "free appropriate public education for *all* handicapped children between the ages of three and eighteen . . ."[96]

Section 21.031 of the Texas Education Code causes some direct clashes with the provisions of the above-stated federal legislation as well as frustrating its general purpose. For example, it is clear under the Education of the Handicapped Act that *all* handicapped children are entitled to free appropriate education. A handicapped undocumented child is manifestly entitled to an education under these provisions, but the Texas statute denies him that right.

While none of the above-stated legislation expressly provides for undocumented children, it is clear that they are among the group that has most concerned Congress in its various educational pronouncements. It is their condition-poverty-that has triggered that legislative concern. The recent reenactment of ESEA occurred at a time of intense debate over illegal immigration to the United States and its effect on the well-being of United States citizens; yet, as previously set forth, each of the relevant Titles provided for the education of all children within the targeted group. In reenacting legislation concerning poor children, migrant children or limited English speaking children in 1978, one could hardly expect Congress to be ignorant of the impact on undocumented children. No hint of an effort to limit those programs on the basis of immigration status

[95]Quoted in a prepared statement by Senator Hathway, Cong. Rec. S14057 (August 23, 1978). [Emphasis added].

[96]20 U.S.C. 1412(2)(B). [Emphasis added]. The entitlement is triggered by receipt by the State of funds authorized under the Act. It is believed that Texas is a recipient of funds under this Act.

is found in such legislation. Silence at this juncture in history speaks loudly.

In sum, by the enactment of the Elementary and Secondary Act in 1965 and subsequent legislation, Congress altered its relationship with the States to achieve the goal of eliminating a de facto class system in the United States which sprung from poverty and led to exploitation. This altered relation is reflected in the quotation from the late Senator Robert Taft found in the Senate report accompanying the initial enactment of the Elementary and Secondary Education Act. As Senator Taft observed:

> Education is primarily a State function, but in the field of education, as in the fields of health, relief and medical care, the Federal Government has a secondary obligation to see that there is a basic floor under those essential services for all adults and children in the United States.[97]

That basic floor has been breached by the Texas legislation. Both directly and indirectly, it frustrates a major federal effort. Legislation which denies a minimal education to a class of innocent children is preempted.

While State legislation can be preempted under various theories, the instant legislation is preempted because it directly conflicts with Federal statutes and, more importantly, because it frustrates their general goals. "Even if Congress has not completely foreclosed State legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid Federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Preemption occurs when the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 57 (1940). See also *Ray, supra*, at 158; *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-541 (1977); *De Canas v. Bica*, 424 U.S. 351, 362 (1976). In order to find preemption under this latter concept, it is not necessary that it be

[97] 1965 U.S. Code, Cong. and Admin. News, 1450.

"imposible to meet both Federal and State requirements." *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1275 (5th Cir. 1978).

Likewise:

> For when the question is whether a Federal act over rides a State law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less than that which is expressed.

Savage v. Jones, 225 U.S. 501, 533 (1912).

While the cases reflect an individual assessment of whether congressional purposes have been frustrated, it is notable that preemption has been found in instances where conflict between congressional purpose and the State legislation was far less direct than in the instant case. For example, in *Graham v. Richardson*, 403 U.S. 365 (1971), this Court ruled that State welfare residency requirements for permanent resident aliens were preempted by the Immigration and Naturalization Act (INA). The Court drew this conclusion notwithstanding a provision in the Social Security Act which specifically had barred provisions such as residency requirements with respect to "citizens." It certainly could have been inferred that such requirements were permissible for non-citizens including permanent resident aliens. Instead, the Court looked to the broader congressional policy found in 42 U.S.C. § 1981 that provides that all persons within the United States shall have "full and equal benefits of all laws," 403 U.S. at 377. See also *Perez v. Campbell*, 402 U.S. 637 (1971).

The unswerving congressional purpose found in the Elementary and Secondary Education Act is directly and immediately frustrated by the exclusion of these children from access to even a rudimentary education; as such, section 21.031 violates the Supremacy Clause of the United States Constitution.

VI
CONCLUSION

Sections 21.031 (a), (b) & (c) are unconstitutional for they violate the Equal Protection Clause and interfere with the objectives of Federal education policy. The rulings of each of the lower Courts should thus be affirmed.

Respectfully submitted,

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Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS

I

THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II

ARTICLE VI, Clause 2, UNITED STATES CONSTITUTION, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

III

TEXAS EDUCATION CODE ANN. tit. 2, § 21.031 (Vernon 1980) provides in part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of that

year in which admission is sought shall be permitted to attend public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.